

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-1216

To be argued by
MILTON S. GOULD

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P/S

IN THE
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

CHAIM KAHAN, SOLOMON WERCBERGER and
MOR WERCBERGER,

Defendants-Appellants.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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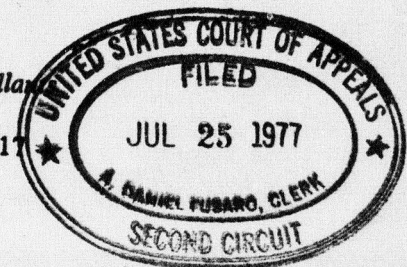


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1216

UNITED STATES OF AMERICA,

Appellee,

-against-

CHAIM KAHAN, SOLOMON WERCBERGER
and MOR WERCBERGER,

Defendants-Appellants.

REPLY BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

It appears that we anticipated most of the government's arguments in our main brief. We address ourselves below to the few items of new matter raised by the government.

The government's brief is a curious thing. It ignores a number of our arguments, and twists others. It

grasps at straws that are very slender indeed in an effort to demonstrate that facts were proved which we claim were not proved at all. It relies heavily on evidence the admissibility of which is challenged on this appeal, in an effort to justify the admissibility of that very evidence. It relies heavily on rulings of the trial court, in an effort to turn aside challenges made on this appeal to those very rulings.

We attempt as best we can below to expose the various types of illogic employed by the government in its brief.

POINT I

THE COGAR TESTIMONY SHOULD HAVE
BEEN RULED OUT OR STRICKEN

We have urged that there was insufficient evidence that appellants participated in any conspiracy, and that therefore the jury should not have been permitted to consider the Cogar testimony concerning conversations outside of appellants' presence.

The government's response has been to cite a vast quantity of evidence, but the evidence cited by the government relates for the most part to the hijacking, and has nothing to do with appellants at all. To the extent evidence concerning appellants is cited, it is evidence relating to appellants' possession of the stolen goods, and not evidence of conspiracy. For example, the government refers extensively to evidence which it claims demonstrates that appellants' possession of the goods was unlawful (Br., pp. 18-20). The government appears to concede, however, that this was no more than "evidence of guilty possession by appellants" (Br., p. 20).

Whether the proof of "guilty possession" was sufficient is not the question on this appeal, however.

The only other evidence cited by the government

in an effort to demonstrate a conspiracy is the evidence relating to the Whitehall Laboratories products (Br., p. 20). The government argues that the Whitehall incident demonstrates that appellants had "prior dealings with the hijackers" (Br., p. 20), and indeed that they had a "working relationship with the thieves" (Br., p. 21, n. 18).

We find this argument remarkable. In the first place, appellants have urged on this appeal that the evidence concerning the Whitehall incident should have been stricken in its entirety, since it was never shown that the Whitehall goods were stolen. In any event, even if the Whitehall evidence was properly admitted, it does not show any conspiracy. It does not show either prior dealings or a working relationship with the hijackers in this case. The government points out that the handwriting on both the Whitehall and Schick bills of lading was the same. But the government cites no evidence to show how appellants, who are not handwriting experts, were to have perceived that the same handwriting appeared on two bills of lading amongst the thousands of such documents which arrive at their premises in the ordinary course of their business. Nor does the government point to any evidence to demonstrate that the Whitehall products were indeed hijacked by the same persons who hijacked the Schick goods, assuming the Whitehall goods were hijacked at all. We respectfully

suggest that the handwriting evidence sheds no light on this question.

Finally, but no less importantly, the fact is that the evidence concerning the Whitehall incident, even if properly admitted, was nevertheless admitted only for a very limited purpose. It was admitted only on the question of the intent of the appellants when they possessed the Schick goods. It was not admitted to show a conspiracy, or to show "prior dealings" or a "working relationship" with hijackers. Therefore it could not be considered by the jury or the Court in determining whether sufficient evidence of conspiracy existed.

We have also urged, on the basis of United States v. Zeuli, 137 F. 2d 845 (2d Cir. 1943) and other similar cases, that evidence of a person's unlawful receipt or purchase of stolen property, while it may prove a crime, does not prove that the possessor conspired with the thief. We urge that what was shown here, at best for the government, was merely that appellants possessed the stolen property. We have urged that the District Court should have recognized this, should have ruled that no conspiracy was proved, and should therefore have excluded the Cogar testimony.

The government does not dispute with us as to the

law. Instead, the government argues that the evidence here shows that appellants made an agreement which was broader than an agreement merely to purchase or possess the property (Br., p. 25). The government first relies upon a ruling by the District Court that the evidence showed more than a "seller and buyer deal," and that appellants "were part of the scheme to hijack and to receive the goods..." (Br., p. 25). This, of course, is the very ruling which is challenged on this appeal. The government's reliance upon it is bootstrap reasoning.

The government next argues that it may be inferred that appellants "examined or accepted the goods" on the very night of the hijacking (Br., p. 26). There is simply no evidence of this. There is no evidence of any connection between appellants and the hijackers as of the night of the hijacking.

The government's argument that an agreement was proved which was broader than a mere agreement to purchase or possess the goods is simply unsupported.

Finally, we have urged that the Cogar testimony, which concerned conversations after appellants were arrested and the goods were seized, was inadmissible because subsequent to any conspiracy, even assuming a conspiracy existed up until

that point. The government's answer to this argument is that "the evidence indicates that payment was yet due and owing despite the seizure" (Br., p. 26). The government refers to evidence that there was to be a meeting some five days in the future at which the hijackers were to receive payment. This evidence, however, was contained in the Cogar testimony itself, the very testimony we urge was inadmissible. In any event, evidence that payment for the goods was to be made would simply be evidence of a "mere sales agreement." Under the rule of United States v. Zeuli, supra, such evidence does not show a conspiracy at all.

We need make only one further comment concerning that part of the government's brief which deals with the Cogar testimony. In several places, the government charges that we have made a "glaring misstatement of the record," or that we "inaccurately represent the record" (Br., p. 23, n. 20).*

* Actually, we think it is the government which has been repeatedly careless in its reading of the record. We have pointed out in our main brief, for example, that at one point the District Court ruled that the conspiracy had ended at the time the FBI agents entered appellants' warehouse and began to question them (p. 30 n.). The government calls this a "misstatement" and argues that the District Court, "a few pages later, specifically stated that he was not implying that the conspiracy had ended when the FBI entered the CBS warehouse (363a-366a)" (Br. pp. 22-23). A reading of the pages cited by the government would seem to indicate that the Court was not suggesting that the conspiracy continued beyond the date of seizure, but was simply ruling that "post-conspiratorial acts" (365a; emphasis added) are admissible, even though post-conspiratorial statements are not.

We do not intend to get into a name-calling contest with the government. We think we have not misrepresented the record at all. We can only urge that the Court read carefully those passages the government states that we have misdescribed. We think the Court will find that those passages support appellants' position.

POINT II

THE EVIDENCE OF A SO-CALLED "PRIOR SIMILAR CRIME" SHOULD HAVE BEEN EXCLUDED

In our main brief (pp. 47-57), we have demonstrated that evidence concerning the Whitehall incident should have been excluded since it was never shown that the Whitehall goods were stolen. We pointed out that the Whitehall traffic and warehouse manager who testified on the subject stated only that the products failed to reach their destination (p. 50). We pointed out that this evidence shows no theft of any kind, and that for all this record shows, the Whitehall goods were misdirected as the result of a traffic manager's mistake or a computer error.

The government has responded merely by citing the testimony of the Whitehall representative, and by more name-calling. The government says that our argument is "frivolous" and "disingenuous" (Br., pp. 31, 32).

The government uses about one and one-half pages of its brief in arguing the Whitehall incident. It cites only one case, and that is a case appellants have discussed in their main brief. The government apparently hopes to create the

impression that the admission of the Whitehall evidence was not terribly important.* We respectfully suggest that the error which occurred when the jury was permitted to consider the Whitehall evidence cannot be laughed off. Evidence of supposed "prior similar crimes" is perhaps the most dangerous and prejudicial sort of evidence that can be received in a criminal trial. It appeals to the tendency which this Court warned of in United States v. Robinson, 544 F. 2d 611 (2d Cir. 1976), to condemn a "bad man...now that he is caught" (p. 618). It invites conviction, not because the defendant is guilty of the crime now charged, but because he is shown to be a generally "bad man."

* If this is indeed the government's strategy, it has elsewhere undermined such strategy by repeatedly relying on the Whitehall evidence to demonstrate other points it tries to make. See Point I above.

POINT III

THE FRUITS OF THE MARCH 13
SEARCH SHOULD HAVE BEEN
SUPPRESSED

Appellants contended in their main brief that the search warrant of March 13, 1975, under which the goods were seized at the appellants' warehouse, was obtained by an affidavit which failed to demonstrate probable cause under the governing law of this Circuit (pp. 61-65). They also argued that the affidavit contained a material misstatement of fact absent which probable cause could not be found (pp. 65-69).

The government's response, for the most part, has been to avoid the issue.

The government argues that because of the informer's alleged "personal observations" the Magistrate "could reasonably conclude" that stolen goods were located within appellants' warehouse (Br., pp. 35-36). This argument completely ignores the explicit holding of United States v. Karathanos, 531 F. 2d 26 (2d Cir.), cert. den., 428 U.S. 910 (1976), cited and discussed in appellants' main brief. There, this Court held that a search warrant affidavit based on the statements of an informer must contain a showing that the informer's assertions of criminal

activity are based upon more than speculation or rumor.

The affidavit in this case does not even contain assertions attributed to an informer to the effect that criminal activity or evidence thereof was present on appellants' premises.* See United States v. Gomez Londono,

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- * So far as we can tell, the government's only effort to deal with this point appears at page 36 of its brief, where it argues that the Magistrate could reasonably infer that the specification number on the cartons identified the goods as being the same as those which were stolen. This argument is refuted in two ways: First, the number was shown on the face of the affidavit itself to be a Schick specification number, and not a shipment identification number. No less importantly, the affidavit contained no evidence whatever that the cartons of goods which were stolen were marked with that number.

The government also argues that the goods could be inferred to have been stolen from the face of the affidavit, because of the fact that they were present in a warehouse shortly after a hijacking which took place in a neighboring state. Precisely the same circumstances were present in United States v. Lee, 427 F. Supp. 318 (E.D.Ky. 1977). There, the affidavit reflected the informant's belief that he had seen property on certain premises which had been taken from residential burglaries in Ohio, and had simultaneously seen stolen firearms which had been transported from Ohio to Kentucky (p. 324). Citing Karathanos and other authority in this Circuit, the Court said that the language of the affidavit was "too conclusory and does not provide the circumstances underlying the information from the informant..." (p. 324).

553 F. 2d 805, 811, n. 9 (2d Cir. 1977) ("We do not mean to suggest that a search warrant can be upheld simply on the basis of a magistrate's good faith belief that a crime has been alleged in the affidavit, regardless whether in fact any crime has been alleged"). Even if assertions of criminal activity could be read into the affidavit, which we deny, the affidavit contains no showing that such assertions were based on other than speculation or rumor.

An affidavit which was nearly word-for-word the same as the affidavit in this case in all material respects was examined by this Court in United States v. Galante, 547 F. 2d 733 (2d Cir. 1976).^{*} There, this Court said that the affidavit "does not meet the Karathanos test" (p. 736, n. 1). Karathanos

* There was only one material difference between the Galante affidavit and the affidavit here. The affidavit in Galante contained a specific assertion that the goods allegedly seen by the informant on the premises to be searched were in fact the goods that had been stolen in a particular robbery. Even that statement, which has no counterpart in the affidavit here, was not enough to validate the Galante affidavit.

and Galante are nowhere cited or distinguished by appellee. We submit that they are indistinguishable from the case at bar. The affidavit is thus invalid; the fruits of the search must be suppressed.

We have also pointed out that the affidavit here contained a highly material misstatement. It said that the informer had been personally present in appellants' premises on March 12, 1975, and had there and then observed the cartons of Schick products. This was false. The informant, it emerged, was nowhere near appellants' premises on the day in question.

The government does not dispute that there was a misstatement, or that it was material. The government argues, however, that the misstatement was a mere "innocent misrepresentation" (Br., p. 39). The government argues that good faith errors are unavoidable, and that excluding evidence obtained as a result of such errors will not serve the purpose of deterring governmental misconduct (Br., p. 40, n. 31). This argument should be judged in the light of this Court's opinion in United States v. Karathanos, supra, 531 F. 2d 26 (2d Cir. 1976). In disposing of an analogous argument, this Court there said that the exclusionary rule is a remedy to be applied wherever the Fourth Amendment has been breached, regardless of "the good or bad faith of the police officer" (p. 33). Dealing specifically with the

argument that good faith misjudgments cannot be deterred, this Court said in Karathanos that even if that is so, nevertheless the exclusionary rule serves the salutary purpose of making magistrates

"...aware that their decision to issue a search warrant is a matter of importance not only in regard to the constitutional rights of the person to be searched, but also in regard to the success of any subsequent criminal prosecutions..." (p. 33).

This awareness, the Court said, may well induce magistrates to give search warrant applications "the scrutiny which a proper regard for the Fourth Amendment requires..." (p. 33).

We respectfully suggest that an awareness of the importance of a search warrant application is something which should be instilled not only in the minds of magistrates, but in the minds of law enforcement officers. It may be that "innocent" misrepresentations in search warrant applications cannot be completely eliminated. We suggest that there is some chance that they will not be so frequent if it is held that they invalidate searches when material.

The government points out (Br., p. 40, n. 31) that some Circuits have declined to invalidate search warrants obtained on the basis of material but innocent misrepresentations, while other Circuits have invalidated warrants obtained on the

basis of any material misrepresentation. Although we believe the decisions of this Court incline toward the latter view, the Court has not yet made its position entirely clear. For the reasons suggested above, i.e., that there is great value in instilling an awareness of the importance of a search warrant in the minds of both policemen and magistrates, we respectfully urge that the Court should adopt the view of the Fifth and Tenth Circuits. In addition to the authorities cited in our main brief and in the government's brief, we invite the Court's attention to United States v. Lewis, 425 F. Supp. 1166 (D. Conn. 1977), wherein this Court's decisions are read as establishing that "the warrant is defective if the misrepresentation is either material or was purposefully intended to deceive the issuing judicial officer" (p. 1173).

Even if the Court should hold that a material misstatement must be at least negligent, and not merely innocent, before it will invalidate a warrant, nevertheless the misstatement here was palpably negligent. The government points out that the District Court found the agent not to have been negligent, primarily because of "the pressure of time" (Br., p. 39). There was no basis for this finding.

Here are the pertinent facts: The affidavit was made by Agent Colgan on the basis of information provided by

Agent Pecoraro, who in turn relied on statements by the informer Pollari. There is no claim by the government that Pollari erred or lied in his statements to Pecoraro.* The government's conduct must therefore be judged with a view to the reasonableness of Pecoraro's treatment of the informer and the transmission of his information.

Pecoraro spoke by telephone with the informer Pollari for a full five minutes on the night of March 12, 1975, the day during which Pollari was engaged in unloading the stolen goods (253a). In that conversation, Pollari identified a number of people with whom he had worked in unloading the goods, and said that "we" had delivered the goods to several warehouses including CBS (252a). Pecoraro met Pollari again the following morning for at least fifteen minutes (253a-254a). Two other FBI agents were also present (254a). In that conversation, which took place at about 7:30 A.M. and well before Pollari went to CBS for the delivery of the remainder of the "load," Pollari reiterated the substance of what he had told Pecoraro the previous evening concerning his activities on March 12. This time, however, he said that "a portion of the load went to CBS" (254a).

* The government's reference (Br., p. 41) to Mapp v. Warden, 531 F. 2d 1167 (2d Cir. 1976), is therefore irrelevant.

When Pecoraro was asked whether Pollari said that he had personally made a delivery to CBS, and when he was asked whether he made that specific inquiry of Pollari, Pecoraro simply said that he had "understood the conversation" to mean that Pollari had personally been at CBS on March 12 (262a-263a). Pecoraro did not claim that he had actually asked Pollari the question, or that Pollari had specifically stated that he had been personally present at CBS.

Pecoraro certainly knew that in his conversations with Pollari he was in the process of obtaining information which might have to be used to obtain a search warrant. Pecoraro certainly knew that the search warrant would be an important, indeed a vital step in the apprehension and prosecution of the targets of his investigation. Pecoraro had five minutes on the night of March 12, and at least fifteen minutes on the morning of March 13, in which to obtain, not necessarily every detail, but at least the basic facts -- such facts as whether Pollari had actually seen the goods on the premises of CBS. Indeed, on the morning of March 13, Pecoraro was accompanied by two other agents. If Pecoraro did not think of asking the question, nevertheless the other agents should have.

Moreover, the story Pollari had told, even assuming

the truth of Pecoraro's testimony (254a, 263a), contained a glaring ambiguity: Pollari had stated that the stolen goods had been transferred to two trucks, and that one had gone to CBS while the other had gone to a different warehouse (263a). The fact that Pollari had not made clear which truck he was in stands out like a beacon.

It would have taken Pecoraro perhaps five seconds to ask the simple question, "Did you personally see the goods on the CBS premises? Where did you personally go during the day of March 12?"

We respectfully suggest that there is no amount of "time pressure" which could excuse Pecoraro's failure to clear up the ambiguity which obviously confronted him, given the circumstances of this case.

Pecoraro and his companions were negligent at the very least. Their failure to ask the very simple question that was necessitated by the facts before them is so stark that it might also raise an inference that they did not want to know the truth.

CONCLUSION

For the reasons stated above and in our main brief, the judgments below should be reversed.

Respectfully submitted,

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